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No. 00-312

Supreme Court, U.S.
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In the

Supreme Court of the United States

MARGARET A. BAGLEY, WARDEN,

Petitioner,

v.

RONALD DEAN COMBS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF ILLINOIS, ALABAMA, ARKANSAS, DELAWARE, IDAHO, LOUISIANA, MAINE, NEBRASKA, NEVADA, NEW HAMPSHIRE, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI CURIAE

This case addresses two interrelated issues. The first of these issues is whether the reliability of the criminal process is enhanced by allowing prosecutors to use pre-*Miranda* statements to rebut a defense of mental incapacity. The Court's decision on this issue will eliminate long-standing conflict over what some state supreme courts and federal courts of appeal consider a legitimate government practice, and others view as a violation of the fifth amendment. The Court's resolution of this question will affect the day-to-day criminal investigation by state and local police officers as well as the effective prosecution based upon the evidence obtained in these investigations. The second issue is whether the reliability of the criminal process is enhanced by finding that the concept of *Strickland* prejudice is not violated by evidence which merely confirms the defendant's guilt. As the States' chief law enforcement officers, the undersigned Attorneys General have a direct and significant interest in the outcome of this case.

SUMMARY OF ARGUMENT

The Fifth Amendment expressly protects against compelled self-incrimination. Through its opinions, this Court has recognized that compelled silence, similarly, is protected by the Fifth Amendment. However, the Court has explicitly left open the question of whether or under what circumstances silence which is not compelled is protected by the Fifth Amendment. Left unsettled, this question has resulted in direct conflict among the circuit courts of appeal. The undecided question is squarely presented by the first question presented in the instant case.

The Fifth Amendment concern here requires an answer to whether, as some circuits and state supreme courts hold, there exists an absolute right to remain silent, or whether,

as other courts hold, it is necessary to strike a balance between the policies underlying an individual's constitutional right to remain silent and society's legitimate interest in law enforcement. Those courts which allow the government to comment on a defendant's silence find that there is no impermissible burden on the Fifth Amendment when the silence either (1) occurred prior to the receipt of *Miranda* warnings or (2) was a fair comment used to rebut or respond to an argument or defense. On balance here, Respondent's pre-*Miranda* statement used to rebut an affirmative defense of mental incapacity should not be found violative of the Fifth Amendment.

Since the notion of an absolute right to silence appears to have been undermined by more recent case law, and since the practical utility of using a pre-*Miranda* statement to rebut an incapacity defense is consistent with precedent which allows pre-*Miranda* silence to impeach a defendant's testimony, this Court should answer the question left unanswered by its current decisions. Resolution of this question would impact the amici states' significant interest in presenting relevant evidence which would serve to promote the truthfinding function of criminal prosecutions.

Similarly, the second question presented also concerns the truthfinding process of a criminal trial. Specifically, answering this question will serve to further define the contours of *Strickland* prejudice and what factors ought not to inform that inquiry. In analyzing an ineffective assistance of counsel claim, the Court has eschewed mechanical application of its rules in favor of a focus on whether the proceeding was rendered fundamentally unfair or the verdict unreliable. The prosecution's cross-examination here did not render the proceeding unfair or the verdict unjust because it merely provided evidence which confirmed the defendant's guilt. The contrary finding by the lower court should be regarded as a windfall to the defendant rather

than the legitimate prejudice contemplated by the Court's opinion in *Strickland*. Should the lower court's decision stand uncorrected, it will chill the effective advocacy of state prosecutors and frustrate what this Court has recognized as the government's chief purpose in a criminal trial—seeking a judgment resting on truth.

Moreover, it should have been apparent to the lower court that there was no reasonable probability of acquittal based upon the facts of record. Overwhelming evidence was presented at trial which established the requisite intent and premeditation such that, even absent the evidence that the Respondent claimed should not have been presented, there was no reasonable likelihood of acquittal.

REASONS FOR GRANTING THE PETITION

I. This Court should resolve the longstanding conflict over whether the Fifth Amendment allows use of pre-*Miranda* silence for purposes other than impeachment.

Recently, this Court expressly stated that "no constitutional rule is immutable" since "[n]o court laying down a general rule can possibly foresee the various circumstances in which counsel will seek to apply it." *See Dickerson v. United States*, ___ U.S. ___, 120 S.Ct. 2326, 2335 (2000) (discussing the constitutionality *vel non* of the warnings of *Miranda v. Arizona*, 384 U.S. 436 (1966)). Consistent with this statement, the contours of the right to silence protected by the Fifth Amendment have been refined by the Court's decisions over time. Initially, the Court recognized an absolute right to silence. *Griffin v. California*, 380 U.S. 609, 613-15 (1965). However, subsequent decisions have clarified that the right may yield under certain circumstances. *See Jenkins v. Anderson*, 447 U.S. 231, 238-39 (1980) (impeachment use of prearrest, pre-*Miranda* warnings silence does

not offend the Fifth Amendment); *see also Fletcher v. Weir*, 455 U.S. 603, 607 (1982) (impeachment use of post-arrest, pre-*Miranda* warnings silence does not offend due process). The first question presented by the petition for writ of *certiorari* seeks to resolve a question, left unanswered by the Court's decision in *Wainwright v. Greenfield*, 474 U.S. 286, 295 (1986). While that decision clarified that the use of post-arrest, post-*Miranda* silence as evidence of sanity violated due process, *id.* at 295, the Court has explicitly left open "whether or under what circumstances prearrest [or pre-*Miranda*] silence[1] may be protected by the Fifth Amendment." *Jenkins*, 447 U.S. at 236 n. 2. The court's silence on this question has led the circuit courts of appeal to develop two conflicting lines of caselaw.

The importance of the question left open by this Court's decisions is clear. Every day, people are questioned in the course of police investigations before arrests are made or suspects are named. Much of this investigation necessarily occurs prior to *Miranda* warnings being given. As a result, *Griffin* and its progeny provide state prosecutors with no guidance in analyzing any resulting pre-*Miranda* statements. Nor do these cases shed any light on the specific question presented by Petitioner—whether a defendant's constitutional privilege against self-incrimination is impermissibly burdened by the use of a pre-*Miranda* statement to rebut a claim of mental incapacitation. Guidance on this question is essential because both the state appellate courts and the federal circuit courts of appeal are sharply divided on the utility of these statements and the constitutional rights contained in the Fifth Amendment should be uniformly applied by states and circuit courts alike. The

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[1] Even if the word "silence" is construed to mean a spoken invocation of the privilege against self-incrimination, like that involved in the instant case, *Jenkins* speaks only to the use of prearrest silence for impeachment purposes.

split among both state appellate courts and the federal circuits on this significant question of constitutional law requires resolution.

A. The *Griffin* - *Jenkins* split

The split among the circuits/state courts may be attributed to the lower courts' reliance upon one of two decisions. Those circuits or state courts that favor exclusion of prearrest silence rely on the Court's suggestion in *Griffin*, that the Fifth Amendment guarantees an absolute right to remain silent.[2] *Griffin*, 380 U.S. at 613-15 (holding that a

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[2] Circuits favoring the exclusion of prearrest silence include the first (*Coppola v. Powell*, 878 F.2d 1562, 1565-66 (1st Cir.), *cert. denied, Powell v. Coppola*, 493 U.S. 969 (1989)); the ninth (*United States v. Whitehead*, 200 F.3d 634, 639 (9th Cir. 2000), *cert. denied, Whitehead v. United States*, 2000 U.S. LEXIS 6033 (U.S. Oct. 2, 2000)); the tenth (*United States v. Burson*, 952 F.2d 1196 (10th Cir. 1991), *cert. denied, Burson v. United States*, 503 U.S. 997 (1992)); and D.C. (*United States v. Moore*, 322 U.S. App. D.C. 334, 104 F.3d 377, 389 (D.C. Cir.), *reh'g en banc denied*, 324 U.S. App. D.C. 53, 110 F.3d 99 (1997)); *but see* pg. 9-10, *infra*, (for a list of circuits which permit prosecutorial comment on a defendant's silence). Similarly, the following states appellate courts have held that the use of pre-arrest, pre-*Miranda* silence to infer guilt violates a defendant's Fifth Amendment right to remain silent: *Hartigan v. Commonwealth*, 31 Va. App. 243, 522 S.E.2d 406, 409-410 (Va. App. 1999), *reh'g granted* 31 Va. App. 511, 525 S.E.2d 9 (2000), *and on reh'g en banc, remanded on other grounds*, 32 Va. App. 873, 531 S.E.2d 63 (2000); *State v. Moore*, 131 Idaho 814, 965 P.2d 174 (Ida. 1998); *State v. Easter*, 130 Wash. 2d 228, 922 P.2d 1285 (Wash. 1996); *Tortolito v. State*, 901 P.2d 387 (Wyo. 1995); *State v. Palmer*, 860 P.2d 339 (Utah App.), *cert. denied*, 868 P.2d 95 (Utah 1993); *State v. Dunkel*, 466 N.W.2d 425, 428-29 (Minn. Ct. App. 1991); *State v. Rowland*, 234 Neb. 846, 452 N.W.2d 758 (Neb. 1990); *People v. De George*, 73 N.Y.2d 614, 543 N.Y.S.2d 11, 541 N.E.2d 11, 13 (N.Y. 1989); *but see* n. 6, *infra* (for a list of state courts which have held that evidence of an accused's prearrest

(continued...)

section of the California state constitution that allowed a prosecutor to comment on a defendant's refusal to testify violated the Fifth Amendment). Although the *Griffin* approach supports a prohibition against substantive use of prearrest silence, *Griffin* itself does not address the use of prearrest silence. Moreover, the Court's subsequent decisions appear to have so undermined *Griffin* that the Court would be unlikely to use that decision to preclude the use of pre-*Miranda* silence for purposes of rebuttal.

1. Erosion of *Griffin*'s absolute Prohibition

In more recent decisions, this Court appears to have cast doubt on *Griffin*'s "penalty doctrine."[3] Suggesting that the Fifth Amendment does not guarantee an absolute right to silence, the Court has held that the Constitution does not prohibit every government action that might penalize the exercise of the privilege. The Court has subsequently maintained that the criminal justice process properly requires defendants to make difficult choices.[4] For example,

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[2] (...continued)
silence does not violate the Fifth Amendment in the absence of government compulsion to speak or remain silent prior to arrest).

[3] What has come to be known as the "penalty doctrine" evolved from the *Griffin* court's explanation that comment by a prosecutor on a defendant's failure to take the stand violates the Fifth Amendment because it "is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." *Griffin*, 380 U.S. at 614.

[4] *See McGautha v. California*, 402 U.S. 183, 213 (1971) (explaining that the criminal justice process often requires defendants to make difficult choices and that the Constitution does not forbid the government from requiring these choices); *see also* Barbara Rook Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 Wm & Mary L Rev 285, 313 (1988)
(continued...)

in *McGautha v. California*, 402 U.S. 183 (1971), the Court held that a single jury may constitutionally both decide a defendant's guilt and determine his sentence. The defendant had argued that the determination of guilt and punishment at a single trial violated the privilege against self-incrimination, because such a practice discourages the defendant from remaining silent at the culpability stage of the trial for fear that, if found guilty, the jury will sentence him without having heard from him. *Id.* at 213. Although the Court acknowledged that, in a single-verdict trial, the defendant may be pressured into taking the stand, the Court held that the penalty for remaining silent is not sufficiently serious to violate the Fifth Amendment. Similarly, in *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Court held that the Constitution permits officials at a prison disciplinary hearing to draw an adverse inference from an inmate's refusal to testify. The Court refused to extend the *Griffin* rule to disciplinary hearings because the stakes are not as high as in criminal trials, and the use of silence does not constitute as serious a penalty. *Id.* at 318-19.

Most notably, the Court in *Jenkins* allowed the prosecution to impeach the defendant's testimony with his prearrest silence, explaining that while such use clearly burdened the exercise of the privilege, the extent of the burden was not impermissible under the dictates of the Fifth Amendment. *Jenkins*, 447 U.S. at 238. Although *Griffin*, unlike *Jenkins*, applies to substantive use of a defendant's silence, the Court's recent treatment of the *Griffin* "penalty doctrine" may indicate that *Griffin* would not be extended to support exclusion of a defendant's pre-*Miranda*

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[4] (...continued)
(explaining that this Court has always been careful to make a distinction between forcing a defendant to make a difficult choice, which is acceptable, and governmental compulsion, which is not).

statement used as rebuttal evidence to a defense of mental incapacity.[5] The *Jenkins* rule, unlike *Griffin*, applies to prearrest silence and has not been undercut by this Court.

2. Application of *Jenkins'* impermissible burden test

Circuits and state appellate courts that favor admitting prearrest silence as evidence of guilt rely on the Court's more recent holding in *Jenkins*. *Jenkins* declined to follow the view that the Fifth Amendment provides an absolute right to silence, holding instead that courts must employ an "impermissible burden" test to determine the constitutionality of impeachment use of prearrest silence. The *Jenkins* "impermissible burden" test provides the most relevant source of analysis for determining whether prosecutorial use of a pre-*Miranda* statement to rebut a defense of mental incapacity violates the Fifth Amendment.

In *Jenkins*, the Court stated that although the potential use of prearrest silence may deter a defendant from remaining silent prior to arrest, "the Constitution does not forbid 'every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights.'" *Jenkins*, 447 U.S. at 236 (*quoting Chaffin v. Stynchcombe*, 412 U.S. 17, 30 (1973)). Instead, the Constitution forbids only those practices that place an "impermissible burden" on the exercise of those rights. Thus, the Court introduced a balancing test that requires courts to deter-

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[5] In *Doyle v. Ohio*, 426 U.S. 610, 618 (1976), this Court prohibited impeachment use of post-arrest silence. Therefore, a straightforward application of *Griffin*'s "penalty doctrine" would have resolved the issue. However, the *Doyle* Court did not mention *Griffin* or the Fifth Amendment issues. The Court's failure to rely on *Griffin* suggests that the "penalty doctrine" is not sufficiently vital to support exclusion of a defendant's silence outside the courtroom.

mine whether the Constitution forbids a government practice by weighing "the legitimacy of the challenged governmental practice" against "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Jenkins*, 447 U.S. at 236-38 (*quoting Chaffin*, 412 U.S. at 32). Thus, under the impermissible burden test, not every government practice that discourages defendants from remaining silent is unconstitutional.

Several circuits permit the government to comment on a defendant's "silence" if it occurred, as it did in the case at bar, prior to the time that he was arrested and given his *Miranda* warnings. *See United States v. Zanabria*, 74 F.3d 590, 593 (5th Cir. 1996) (no Fifth Amendment violation where silence at issue was neither induced by nor a response to any action by a government agent); *United States v. Rivera*, 944 F.2d 1563, 1568, 1568 n.12 (11th Cir. 1991) (government may "unquestionably" comment on defendant's silence post-arrest because she had not yet received *Miranda*'s "implicit assurances"); *Thomas v. Indiana*, 910 F.2d 1413, 1416 (7th Cir. 1990) (testimony about defendant's request for an attorney did not violate *Greenfield* since request was made before defendant was given his *Miranda* warnings); *United States v. Rederth*, 872 F.2d 255, 258 (8th Cir. 1989) (*Doyle* and its progeny were not violated where defendant was not given affirmative governmental assurances that his silence would not be used against him).[6]

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[6] Several state courts have also held that evidence of an accused's prearrest silence does not violate the Fifth Amendment in the absence of government compulsion to speak or remain silent prior to arrest, including: *State v. Adams*, 221 Wis. 2d 1, 584 N.W.2d 695, 699 (Wisc. Ct. App. 1998); *Key-El v. State*, 349 Md. 811, 709 A.2d 1305, 1310-11 (Md.), *cert. denied*, 525 U.S. 917 (1998); *State v. Dreher*, 302 N.J. Super. 408, 695 A.2d 672, 704-06 (N.J. Super. Ct. App. Div.), *certification denied*, 152 N.J. 10, 702 A.2d 349 (1997), *cert. denied*, 524 U.S. 943 (1998); *State v. Kiser*, 43 Conn.

(continued...)

Still other circuits permit the prosecution to "fairly comment" on a defendant's silence. *See United States v. McNatt*, 931 F.2d 251 (4th Cir. 1991), *cert. denied, McNatt v. United States*, 502 U.S. 1035 (1992) (relying upon the reasoning of *United States v. Robinson*, 485 U.S. 25 (1988) (where prosecutor sought permission to comment upon the defendant's failure to testify not on his own initiative, nor to treat silence as substantive evidence of guilt, but simply in fair response to a claim made by defendant or his counsel); *see also United States v. Isaac*, 134 F.3d 199, 206-07 (3d Cir. 1998) (prosecutor's rebuttal "was a fair response to defense counsel's closing argument"). Consistent with the reasoning employed in *Jenkins*, these circuits reason that, on balance, such silence is not violative of the Fifth Amendment.

The *Jenkins* majority based its holding on the finding that "[i]mpeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truthfinding function of the criminal trial." *Jenkins*, 447 U.S. at 238. While this rationale was implicated in *Jenkins* because the defendant there took the stand, arguably, it should apply with equal force to a situation, like that at issue in the instant case, where the State is merely rebutting an argument advanced by the defendant.

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[6] (...continued)
App. 339, 683 A.2d 1021, 1029 (Conn. App. Ct.), *appeal denied*, 239 Conn. 945, 686 A.2d 122 (1996), *cert. denied* 520 U.S. 1190 (1997); *State v. Houle*, 162 Vt. 41, 642 A.2d 1178, 1181 (Vt. 1994); *State v. Masslon*, 746 S.W.2d 618, 626 (Mo. Ct. App. 1988); *State v. Hegelson*, 303 N.W.2d 342, 348-49 (N.D. 1981); *see also State v. Lee*, 15 S.W.3d 921, 925-926, n. 7, 2000 Tex. Crim. App. LEXIS 44 (Tex. Crim App. 2000) (implying that prearrest silence is a constitutionally permissible area of inquiry).

B. Significant Governmental Interest

The prosecution has a significant interest in presenting relevant evidence of a defendant's guilt at trial. *See Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (stating that prosecution has interest in presenting all relevant evidence to rebut defendant's exculpatory story); *see also United States v. Maggitt*, 784 F.2d 590, 596-98 (5th Cir. 1986) (discussing prosecution's "probative" interest in presenting evidence of defendant's prior criminal convictions); *United States v. Leichtman*, 742 F.2d 598, 603-05 (11th Cir. 1984) (discussing prosecutor's "probative" interest in introducing evidence to establish motive in kidnapping case). The prosecution's purpose is to convict guilty parties. In *Jenkins*, one of the government's concerns was advancing the truthfinding function of the jury. *Jenkins*, 447 U.S. at 238 (*quoting Brown v. United States*, 356 U.S. 148, 156 (1958) (stating that once defendant decides to testify, truth prevails in balance against self-incrimination)). Similarly, in cases involving prosecutorial use of prearrest silence, where the relevant evidence is presented to rebut a defendant's affirmative defense at trial, the government has a significant interest in providing the jury with all available evidence to assist with its deliberation.

Prosecutorial use of such prearrest silence will provide additional relevant evidence to the jury, thus assisting the jury in its search for the truth. *See United States v. Rincon*, 28 F.3d 921, 923-25 (9th Cir.), *cert. denied, Rincon v. United States*, 513 U.S. 1029 (1994) (discussing importance of providing the jury with all evidence admissible under Federal Rules of Evidence and relevant to the case) (*citing Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). As the *Jenkins* Court explained, it is legitimate for the state to impeach a defendant with his prearrest silence because such impeachment "may enhance the reliability of the criminal process." *Jenkins*, 447 U.S. at 238. Moreover, the Federal Rules of Evidence permit admission in a criminal trial

of all relevant evidence, so long as its probative value exceeds its prejudicial effect. *See* Federal Rules of Evidence 401, 403. A defendant's prearrest silence may have probative value if the silence is inconsistent with the position the defendant assumes at trial.

In determining whether the prearrest silence is inconsistent, some courts ask whether it would have been "natural" for the defendant to speak up under the circumstances. *See United States v. Hale*, 422 U.S. 171, 176-80 (1975) (*citing* John Henry Wigmore, 3A *Evidence in Trials at Common Law* § 1042 (Chadbourn rev ed 1970) (prohibiting impeachment use of defendant's pretrial silence on evidentiary grounds). For example, if a defendant who has remained silent prior to arrest takes the stand and testifies that he acted in self-defense, the prearrest silence suggests that the defendant is lying if it would have been natural for the defendant to come forward with his defense earlier. Likewise, if a defendant refuses to speak with the police during his prearrest investigation and then pleads not guilty at trial, the prearrest silence suggests that the defendant may, in fact, be guilty if it would have been natural for the defendant to have spoken up and proclaimed his innocence early on. If the prearrest silence does have probative value, and if the probative value exceeds the potential prejudicial effect, admitting the prearrest silence can help the fact finder discover the truth.

Furthermore, evidence of prearrest silence may be likened to circumstantial evidence which may be used at trial. For example, in its case-in-chief, the prosecution may introduce evidence that the defendant fled from the police. *See United States v. Ballard*, 423 F.2d 127, 133 (5th Cir. 1970) (asserting that law is well settled that evidence of defendant's flight is admissible evidence against him). The type of prearrest silence at issue here and flight are similar because they both involve an affirmative act on the part of a defendant which demonstrates an unwillingness to cooperate

with law enforcement. *See Rivera*, 944 F.2d at 1567-68 (stating that defendant's prearrest silence is admissible and likening it to prearrest demeanor evidence). Therefore, because courts accept that evidence of flight is admissible in the State's case-in-chief, evidence of a defendant's prearrest silence similarly should be found admissible.

Moreover, courts generally allow the prosecution to question witnesses concerning a defendant's demeanor. *See Pennsylvania v. Muniz*, 496 U.S. 582, 585-87 (1990) (providing example of prosecutor asking demeanor questions in drunk-driving context); *see also United States v. Shaw*, 701 F.2d 367, 384-85 (5th Cir. 1983), *reh'g denied*, 714 F.2d 544 (1983), *cert. denied, Shaw v. United States*, 465 U.S. 1067 (1984) (asserting that prosecution can comment on defendant's demeanor after defendant waives *Miranda* rights). Prosecution witnesses can testify to a defendant's unusual behavior. *See Muniz*, 496 U.S. at 590-92. This does not differ significantly from an officer testifying to a defendant's silence during prearrest investigatory questioning. *See Rivera*, 944 F.2d at 1567-68 (comparing evidence of defendant's prearrest silence to evidence of defendant's prearrest demeanor). Officers' testimony concerning prearrest silence and prearrest demeanor both reference a defendant's unspoken actions. Therefore, because no significant difference exists between demeanor and prearrest silence evidence, a court should allow evidence of a defendant's prearrest silence in the prosecution's case-in-chief. *See Rivera*, 944 F.2d at 1568-69.

Since the use of the defendant's pre-*Miranda* "talk to my lawyer" statement to rebut his claim of mental incapacity is consistent with this Court's precedent allowing for the impeachment use of similar statements, will advance the truthfinding function of criminal trials, is analogous to the permissible use of circumstantial and demeanor evidence, and because both the federal circuit courts of appeal and the state appellate courts are split on whether the prosecu-

tion may use evidence of a defendant's noncompelled pre-arrest silence in its case-in-chief, this Court should grant *certiorari* and resolve the confusion. This issue demands uniform treatment among all federal and state courts.

II. This Court should address whether the concept of "prejudice" embodied in *Strickland* may be established by testimony from a defense witness on cross-examination which merely confirms the defendant's guilt.

A. "Fair trial" understanding of Strickland

In *Strickland v. Washington*, 466 U.S. 666 (1984), the Court began its analysis by recognizing a long line of cases establishing that the Sixth Amendment right to counsel exists "in order to protect the fundamental right to a fair trial." *Id.* at 684-85 (*citing Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963)); *see also Lockhart v. Fretwell*, 506 U.S. 364, 368 (1993) (reemphasizing same). In giving meaning to the right to counsel, the Court remained guided by this "purpose—to ensure a fair trial." *Strickland*, 466 U.S. at 686. The two-pronged test articulated by the Court reflects this concern, requiring that defendant demonstrate (1) deficient performance and (2) prejudice.[7] In order to demonstrate the requisite prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The Court further defined reasonable probability as "a probability sufficient to undermine confidence in the outcome." *Id.* In applying this standard, the Court was mindful of the importance of practical considerations and warned against the

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[7] Petitioner concedes that counsel's performance was deficient. She focuses her argument exclusively on the prejudice prong.

mechanistic application of its rule. *Id.* at 696. The ultimate focus, it instructed, must be on the fundamental fairness of the proceeding in question. *Id.*

Keeping in mind the Court's focus and its admonition against mechanical application, the lower court's contrary finding of prejudice justifies the grant of *certiorari* here. Straightforward application of the principles underlying the rule announced in *Strickland* here should have resulted in a finding of no prejudice on the ineffective assistance claim regarding the testimony of Dr. Fisher on cross-examination. *See Fretwell*, 506 U.S. at 370 n. 3. This case presents a situation "in which it would be unjust to characterize the likelihood of a different outcome as legitimate 'prejudice.'" *See Williams v. Taylor*, 529 U.S. 362, 417 (2000). While no one decision of the Court appears to have squarely addressed this issue, the reasoning employed in several of its opinions suggests that such evidence leads to neither an unjust nor unfair verdict.

For example, although the instant case is factually distinct from the situation presented in *Nix v. Whiteside*, 475 U.S. 157, 175-76 (1986), the precedential value of that case for this one is clear. In *Nix*, the Court held that even if a defendant's false testimony might have persuaded the jury to acquit him, it was not fundamentally unfair to conclude that he was not prejudiced by counsel's interference with his intended perjury. *See also id.* at 186-87 (Blackmun, J., concurring) ("To the extent that Whiteside's claim rests on the assertion that he would have been acquitted had he been able to testify falsely, Whiteside claims a right the law simply does not recognize . . . . Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice"). As a matter of law, the Court held that *Strickland* prejudice could not be established based upon whether the jury would have been swayed by the perjured testimony. *See Nix*, 475 U.S. at 175. Instead, the

Nix Court identified the "benchmark" of an ineffective assistance claim as the fairness of the proceeding. *Id.* Consequently, the Court's decision turned on whether the jury's verdict was rendered unreliable because they did not get to hear the perjury. *Id.*

Similarly, in *Lockhart v. Fretwell*, 506 U.S. 364, 369-72 (1993), the Court concluded that, given the overriding interest in fundamental fairness, the likelihood of a different outcome attributable to an incorrect interpretation of the law should be regarded as a potential "windfall" to the defendant rather than the legitimate "prejudice" contemplated by the Court's opinion in *Strickland*. The death sentence imposed by the state of Arkansas on Fretwell was based on an aggravating circumstance (murder committed for pecuniary gain) that duplicated an element of the underlying felony (murder in the course of a robbery). However, before trial, the United States Court of Appeals for the Eighth Circuit held that such "double counting" was impermissible. *See Collins v. Lockhart*, 754 F.2d 258, 265 (8th Cir. 1985), *cert. denied, Lockhart v. Collins*, 474 U.S. 1013 (1985). Fretwell's counsel (who, undoubtedly was unaware of *Collins*), failed to object to the double counting. Then, before Fretwell's claim for federal *habeas corpus* relief reached this Court, *Collins* was overruled.[8] Accordingly, even though the Arkansas trial judge probably would have sustained a timely objection to the double counting, it had become clear that the State had a right to rely on the

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[8] *See Lowenfield v. Phelps*, 484 U.S. 231 (1988), *reh'g denied*, 485 U.S. 944 (1988) (holding that an aggravating circumstance may duplicate an element of the capital offense if the class of death-eligible defendants is sufficiently narrowed by the definition of the offense itself); *see also Perry v. Lockhart*, 871 F.2d 1384 (8th Cir.), *reh'g en banc denied*, 1989 U.S. App. LEXIS 11036 (1989), *and cert. denied*, 493 U.S. 959 (1989) (holding that *Lowenfield* required court to overrule *Collins*).

disputed aggravating circumstance. *See Williams*, 529 U.S. at 417.

The reasoning employed in both *Nix* and *Fretwell* applies with equal force to the instant case. Here, as in those cases, the result of the proceeding was rendered neither unreliable nor fundamentally unfair as a result of the prosecution's cross-examination of defense witness, Dr. Fisher. Moreover, the Sixth Circuit's contrary finding is akin to the granting of a "windfall" which the Court's decisions have disdained. *See Fretwell*, 506 U.S. at 369-70 (*citing Nix*, 475 U.S. at 175).

Like the aforementioned cases, the instant case illustrates another factor that ought not to inform the prejudice inquiry. In this sense, it is analogous to a point addressed by Justice Powell in his concurrence in *Kimmelman v. Morrison*, 477 U.S. 365 (1986). Justice Powell observed that "the exclusion of illegally seized but wholly reliable evidence renders verdicts less fair and just, because it 'deflects the truthfinding process and often frees the guilty.'" *Id.* at 396 (Powell, J., concurring) (*quoting Stone v. Powell*, 428 U.S. 465, 490 (1976)); *see also Holman v. Page*, 95 F.3d 481, 492 (7th Cir.), *reh'g en banc denied*, 102 F.3d 872 (1996), *cert. denied*, 520 U.S. 1254 (1997) (citing Justice Powell's concurrence in *Morrison* with approval and holding that under *Strickland* no prejudice exists when evidence gathered in violation of the Fourth Amendment is erroneously admitted at trial).

B. The chilling effect of the Sixth Circuit's concept of *Strickland* prejudice

Viewed as a whole, the Court's decisions illustrate that "the touchstone of an ineffectiveness claim is the fairness of the adversary proceeding," *Lockhart v. Fretwell*, 506 U.S. 364, 370 (1993), whose "'premise . . . is that partisan ad-

vocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (*quoting Herring v. New York*, 422 U.S. 853, 862 (1975)).

However, if allowed to stand as correct, the Sixth Circuit's view of *Strickland* prejudice will undermine the advocacy of state prosecutors and frustrate the ultimate truth seeking function of a trial. *See Nix*, 475 U.S. at 174 ("lawyer is an officer of the court and a key component of a system of justice, dedicated to a search for truth."). Simply stated, the lower court's decision chills effective cross-examination by prosecutors. While the Court has held that *Strickland*'s prejudice prong does not implicate the same concerns as the performance prong, such as dampening the ardor or impairing the independence of defense counsel (*Fretwell*, 506 U.S. at 372), these concerns do implicate *Strickland*'s prejudice prong with regard to the prosecuting attorneys' conduct in situations like that presented here.

The Sixth Circuit's view of prejudice discourages vigorous cross-examination. In instances where defense counsel would merely be deficient under *Strickland*'s first prong (*e.g.* for failing to prepare his witness), a vigorous cross-examination could potentially result in additional incriminating evidence which, while furthering the truthfinding function of the trial, could potentially result in sufficient prejudice under *Strickland*'s second prong. In this way, vigorous advocacy would result in elevating what would ordinarily be a mere deficiency on defense counsel's part to constitutionally ineffective assistance of counsel. Thus, if the Sixth Circuit's analysis is taken to its logical conclusion, prosecutors will lack reasonable power, or desire, to test the truth of a defense or to effectuate the truthfinding function of a trial. *See Nix*, 475 U.S. at 185 (Blackmun, J., concurring) (suggesting that the sole ultimate objective of a trial is a judgment resting on truth).

C. No reasonable probability of acquittal on these facts

The lack of merit of Combs' prejudice claim should have been apparent to the Sixth Circuit. Given the overwhelming evidence of intent and premeditation presented by the prosecution in this case, it is not "reasonably probable" that the evidence that Combs suggests should not have been presented would have resulted in his acquittal. *See* Pet. at 2-3 (for a detailed description of the evidence of intent and premeditation). Combs has no valid claim that confidence in his trial was diminished by Dr. Fisher's testimony on cross-examination which further served to establish his guilt. *See Nix v. Whiteside*, 475 U.S. 157, 175 (1986). The Sixth Circuit's holding simply fails to account for the fact that no showing was made here that the justice of Combs' sentence was rendered unreliable by a breakdown in the adversarial process. *Strickland*, 466 U.S. at 700.

CONCLUSION

For the aforementioned reasons, the *amici* States respectfully urge this Court to grant Warden Margaret A. Bagley's Petition for Writ of *Certiorari*.

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